Mailed: September 30, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re Caffe D'Amore, Inc.

Serial No. 78161902

_____

Vincent G. Gioia of Christie, Parker & Hale, LLP for Caffe D'Amore, Inc.

John Dwyer, Trademark Examining Attorney, Law Office 116 (Meryl Hershkowitz, Managing Attorney).

_____

Before Seeherman, Walters and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Caffe D'Amore, Inc. to register the mark ESPRESSIMO for the following goods, as amended:[1] "blended powder mix used in the preparation of cappuccino and cappuccino drinks" in Class 30; and "blended powder mix used in the preparation of cappuccino-flavored soft drinks" in Class 32.

The trademark examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's

[1] Application Serial No. 78161902; filed September 9, 2002, based on an assertion of a bona fide intention to use the mark in commerce.

goods, so resembles the registered mark ESPRESSIMO for "electric espresso maker and parts therefor, for domestic and commercial use" as to be likely to cause confusion.[2]

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); and In re Azteca Restaurant Enterprises Inc., 50 USPQ2d 1209 (TTAB 1999).

In this case, applicant's and registrant's marks, ESPRESSIMO, are identical. When marks are identical it is only necessary that there be a viable relationship between the goods in order to support a holding of likelihood of confusion. See In re Concordia International Forwarding Corp., 222 USPQ 355, 356 (TTAB 1983). With that in mind, we turn to a consideration of the goods.

The examining attorney contends that espresso machines used to make cappuccino and powdered mixes used to make cappuccino

[2] Registration No. 1870466; issued December 27, 1994. Affidavits under Sections 8 and 15 accepted and filed, respectively.

drinks are related in that both products are used to make the same type of drinks. The examining attorney has introduced excerpts of Nexis articles, website printouts and an Internet search summary which, according to the examining attorney, show that cappuccino is a particular type of coffee drink made from coffee beans and that espresso machines and cappuccino drinks are related products. The examining attorney has also submitted third-party registrations which he claims illustrate that the respective products may emanate from the same source and that they are "sold through the same retailers and wholesalers." Brief, p. 10.

Applicant, on the other hand, argues that espresso machines and blended powder mixes are neither similar, competitive nor complementary products. Applicant contends that, unlike truly complementary products such as the espresso makers and the espresso beans shown in the examining attorney's third-party registrations, drinks made from applicant's blended powder mixes are produced by simply combining the mix with water, and registrant's machines cannot be used to process applicant's blended powder mixes or to produce drinks made from those mixes. In fact, according to applicant, "registrant would be perceived as being unlikely to sponsor or provide...a blended powder mix because it eliminates the need for Registrant's espresso machine." Reply Brief, p. 4.

Applicant further contends that the goods travel through different channels of trade and are sold to purchasers having different levels of sophistication. Applicant maintains that registrant's espresso makers are sold to commercial establishments and that the respective products are vastly different in price. In this regard, applicant points to registrant's product brochure showing that registrant's espresso machines cost between $1,745 to $2,570 and applicant contrasts the high cost of those products with the $5 to $10 price range of its own products.

It is true that registrant's espresso maker and applicant's powdered mixes for making cappuccino drinks are distinctly different products. However, the question is not whether purchasers can differentiate the goods themselves but rather whether purchasers are likely to confuse the source of the goods. See Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the goods of the applicant and registrant be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with

the same source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

Notwithstanding applicant's arguments, we find that there is at least a viable relationship between these goods. Registrant's espresso machine is used to make cappuccino, a particular type of coffee made with espresso. Applicant's blended powdered mix can be used, according to the identification of goods, "in the preparation of" cappuccino. Based on the identification of goods, it is not unreasonable to assume that a basic ingredient of the identified powdered mix is espresso and that powdered espresso mix can be used in an espresso machine. Thus, the products, as identified, are complementary in that an espresso maker and blended powdered espresso mix can be used together to produce a cappuccino beverage.

Although applicant insists that its particular blended powdered mix cannot be used in an espresso machine, the likelihood of confusion must be determined based on the identification of goods set forth in the application, and applicant's goods, as identified, are not limited to any particular manner of use. See In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993). We see no reason why the goods, as identified, would not encompass a powdered coffee product that is put in a coffee maker to prepare cappuccino and cappuccino drinks.

To the extent that applicant is asserting that it is not possible for this type of product to be used with an espresso maker, there is nothing in the inherent nature of the goods or in the record to support this contention. Moreover, we note that one third-party registration submitted by the examining attorney (Registration No. 2201559) expressly covers "powders" that come in a packet "from which coffee... may be created by subjecting the packets to hot water under pressure," e.g., by using an espresso machine.

Registrant's identification of goods also specifically states that its machines are for domestic as well as commercial use. Thus, applicant's argument that the goods travel in different channels of trade because registrant's goods are sold to commercial establishments must fail. As for applicant's argument regarding the differences in price of the products, applicant has only provided evidence of the cost of registrant's commercial espresso machines. There is no evidence that home models of espresso makers would be as expensive as commercial models. In fact, a Nexis excerpt from *The Patriot Ledger* (February 6, 2003) suggests that espresso makers for consumer use are very affordable, ranging in price from $29.99 to $99.99. In any event, while the higher cost of an espresso maker may affect the care a consumer may exercise in selecting one, the price difference between an espresso maker and a powdered cappuccino mix would not

necessarily affect a consumer's perception that the two products are related.

We also note that several marks have been registered for retail stores or other retail outlets that sell both espresso makers and coffee products. However, it is not particularly significant whether or not applicant's and registrant's products may typically be purchased through the same outlets since the two products may not even be purchased at the same time. Consumers who had previously purchased registrant's ESPRESSIMO espresso machine and used it to make cappuccino, upon encountering applicant's powdered mixes, the basic ingredient of which is espresso (or which they assume is espresso), under the identical ESPRESSIMO mark, regardless of where they find it, are likely to believe, because of the products' complementary nature, that they come from or are sponsored by the same company.

Furthermore, applicant's goods are inexpensive items that are likely to be purchased on impulse, and consumers who are familiar with the registrant's espresso makers, upon seeing applicant's powdered mixes sold under the same mark, are unlikely to give the matter great deliberation, but will simply assume that they emanate from the same source.

While the mark ESPRESSIMO may be suggestive of registrant's goods, and therefore not entitled to a broad scope of protection, the mark is at least entitled to protection from registration of

the identical mark for related goods. See In re Colonial Stores, Inc., 216 USPQ 793 (TTAB 1992). See also King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

In view of the foregoing, and because the identical marks ESPRESSIMO are used in connection with at least viably related goods, we find that there is a likelihood of confusion.

To the extent that there is any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register is affirmed.